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Supreme Court of the United States

October Term, 1951

No. 255

STERLING L. HICKS, *Petitioner*,

v.

STATE OF NORTH CAROLINA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, and the appellant below, prays that a writ of certiorari issue to review the judgment and the opinion of the Supreme Court of the State of North Carolina entered in the above case on May 2, 1951. (R. 125)

OPINIONS BELOW

The Mecklenburg Superior Court in which the case was tried did not render an opinion. The opinion of the Supreme Court of the State of North Carolina is set forth in the record [R. 125-133].

JURISDICTION

The opinion and judgment of the Supreme Court of the State of North Carolina was rendered on May 2, 1951. Jurisdiction of this Court is invoked under Title 28 Section 1257 of the Judicial Code of the United States. The time in which to file a petition for certiorari was extended in accordance with the rules of this Court to August 30, 1951, by order of the Chief Justice signed on July 27, 1951. [R. 133]

Jurisdiction of this Court is involved under Section 1 of the 14th Amendment to the Constitution of the United States, the particular provision reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The jurisdictional question arises from the record itself, showing the failure of the Courts of North Carolina to afford to the Petitioner due process of law. The particular matters which are complained of relate primarily to the failure of the Courts of North Carolina to apply the provisions of the Constitution of North Carolina, namely Section 17 of the Constitution of that State, which reads as follows, to wit:

> "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

The Courts of the State of North Carolina have held that this constitutional prohibition applies to a person being tried twice for the same offense (*State v. Mansfield,* 207 N. C., 233, 176 S. E. 761).

The provisions of the Constitution of North Carolina conform to the 5th Amendment to the Constitution of the United States, which reads as follows:

> "No person shall be held to answer to a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Petitioner contends that he was acquitted in a trial and the indictment charging the same crime of which he now stands convicted and that his conviction now affirmed by the Supreme Court of North Carolina is for the same identical crime or offense for which he had previously been acquitted. This defense of double jeopardy was fully pleaded at the commencement of trial on the indictment for which he now stands convicted. The question was fully and completely raised prior to the commencement of the last trial, as will be shown by the record in this case, pp. 5 to 9, inclusive.

The Trial Court not only denied the Petitioner's plea of double jeopardy, but refused to tender to the jury any issues thereunder, and further refused to permit the Petitioner to offer evidence in the support of his plea of former acquittal or former jeopardy (R. 9).

The allegations of the indictment on which the Petitioner had been acquitted, and the allegations of the indictment on which he now stands convicted, will be hereafter referred to, and the Petitioner respectfully submits that the indictments in question were identical in their

allegations, and that the same evidence and the same testimony that was submitted to the Court and the jury in the trial now complained of was the same evidence and the same testimony given in a previous trial in which he had been acquitted of the same offense.

The record in the case shows that not only the question of double jeopardy was raised at the trial that the Petitioner now stands convicted, but that exception was duly taken to the refusal of the Court to apply the principles of former jeopardy, the refusal of the Court to hear testimony or to submit the issues to the jury on the question of double jeopardy (R. 9).

In this connection, the attention of this Court is invited to the record relating to the plea of double jeopardy. The Petitioner was tried on March 20, 1950 in the Superior Court of Mecklenburg County, North Carolina, on an indictment No. 15772 which read as follows: [R. 6]

> "The Jurors for the State upon their oath present, that: Chesley Morgan Lovell and Sterling L. Hicks, late of the County of Mecklenburg, and other person or persons to the State unknown, on the 12th day of January, 1950, and prior thereto, with force and arms, at and in the County aforesaid did wilfully, unlawfully and feloniously combine, conspire, confederate, and plan together amongst themselves each with the other and with each other, to wilfully and maliciously and wantonly injure and damage a building owned by the Jefferson Standard Broadcasting Company, which said building was then and there in actual use by said Jefferson Standard Broadcasting Company for business purposes, by the use of dynamite and other high explosives, against the form of the statute and in such case made and provided and against the peace and dignity of the State."

He was also tried on an indictment No. 15-773 set forth on page 7 of the record as follows:

"The Jurors for the State upon their oath present, that: Chesley Morgan Lovell and Sterling L. Hicks, late of the County of Mecklenburg, and other person or persons to the State unknown, on the 12th day of January 1950, and prior thereto, with force and arms, at and in the County aforesaid, did wilfully and unlawfully combine, conspire, confederate, and plan together amongst themselves each with the other and with each other, to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company against the form of the statute in such case made and provided and against the peace and dignity of the State.

And the Jurors for the State upon their oath further present, that: Chesley Morgan Lovell and Sterling L. Hicks, late of the County of Mecklenburg, and other person or persons to the State unknown, on or about the 12th day of January 1950, and prior thereto, with force and arms, at and in the County aforesaid, did wilfully, unlawfully, and feloniously combine, conspire, confederate, and plan together amongst themselves, each with the other and with each other, to wantonly and wilfully injure the personal property of the Jefferson Standard Broadcasting Company, to-wit: radio broadcasting equipment, against the form of the statute and in such case made and provided and against the peace and dignity of the State."

The Petitioner, on March 20, 1950, was acquitted under indictment 15,772 (R. 6) and the Trial Court at the same time sustained a motion for non-suit as to indictment 15,773, which is set forth on page 7 of the record.

The Petitioner asserts that his acquittal on indictment 15,772, and a non-suit at the close of all the evidence at the same trial on indictment 15,773 (R. 7), effectively disposed of any criminal charges which might or could have been brought against the petitioner thereafter. The indictment upon which the Petitioner was tried and now

found to be guilty (R. 5-6), is identical in form and language with the indictments under which he had been previously acquitted or non-suited, with the exception as to the allegation as to the ownership of the property in question. The first indictment alleged that the Petitioner did wilfully, unlawfully, and feloniously combine, conspire, confederate, and plan together amongst themselves, each with the other and with each other, to wantonly and wilfully injure and damage a building owned by the Jefferson Standard Broadcasting Company. The difference between the two indictments under which the Petitioner was tried and acquitted, and the State was non-suited, was only the allegation as to the ownership of the property.

It is admitted that the conspiracy was against the same property, the only defect being the question of ownership, and no question of ownership was raised under indictment 15,772 at the prior trial. There was but one alleged offense, to-wit, a conspiracy, and the Petitioner has definitely been acquitted of that offense.

The law is firmly established that where an act constitutes several crimes, there may be separate prosecutions for each crime, but the state cannot split up a single crime and prosecute it in parts. A prosecution of any part of a single crime bars further prosecution based upon a whole or part of the same crime (16 C J p 270 and cases cited). This is the law of North Carolina (*State* v. *Fayettesville,* 6 N. C. 371). It is also a general rule of law, such as in the case of larceny offenses, that the larceny of several articles at one and the same time constitutes an indictable offense, and conviction or acquittal of the larceny of any one or more of them is a bar to a subsequent prosecution for the larceny of the others (16 C J 270 par. 248).

Where the accused has once been placed on trial in a court competent to try the offense of the character

charged, and the jury, having once rendered a verdict of not guilty as to said offense, the state can never place him on trial again for the same offense, no matter how irregular the proceedings have been. (22 C. J. S. p 402, par. 268; 16 C J 255) and this is likewise the law of North Carolina (*State* v. *Jesse*, 20 N. C. 95).

The Petitioner has been convicted of the identical crime of which he had previously been acquitted. There was but one alleged conspiracy and the evidence and proof were the same and identical under the indictments for which the Petitioner now stands convicted as it was under the indictments in which he was acquitted. (See the case of *Short* v. *U. S.*, 91 Fed. 2d 614 4th CCA, 112 A L R 969). In that case, Circuit Judge Parker discussed the law applying to former jeopardy in conspiracy cases, and it was held that the Government can split up the conspiracy into different indictments and prosecute all of them, but that the prosecution for any part of a single crime bars any further prosecution based upon a whole or a part of the same crime (*Murphy v. U. S.*, 285 Fed. 801, 816; *in re Snow*, 120 U. S. 274, 30 L. Ed. 658, 16 C J 270).

The views expressed in the above opinions have the recent approval of this Court (*Sealfon* v. *U. S.* 332 U. S. 575, 92 L Ed. 180). This Court, in the case just cited, reversed the conviction in a conspiracy case and among other things said:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. * * * Thus, with some exceptions, one may be prosecuted for both crimes. * * * But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings * * * and operates to conclude those matters in issue which the verdict determined though the offenses be different. * * * The basic facts in each trial were

identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. Thus the core of the prosecutor's case was in each case the same; the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have gotten out of it. But at most this evidence only made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

It is clear from the foregoing that the Courts of North Carolina by having convicted and later affirmed the present conviction of the Petitioner, failed to accord to the Petitioner that due process which is required under the 14th Amendment to the Constitution of the United States. The Courts of North Carolina not only refused or failed to apply the plea of former jeopardy under the Constitution of North Carolina, but clearly failed and refused to follow the decisions applicable to the double jeopardy under which the Petitioner had rights which should have been protected by the Courts.

While the Petitioner did not specifically say at the time that the plea of double jeopardy was filed and the proof in support of it was offered, that the failure of the Court to permit the plea was in violation of the due process clause of the 14th Amendment to the Constitution of the United States, the point was effectively raised, and does arise by the very nature of the facts so pleaded and the constitutional question involved in the Petition

on Writ of Certiorari arises from the record itself made in the Trial Court. The constitutional question is not hidden in the record, as in the case of *Whitney* v. *California* (274 U. S. 357, 71 L Ed 1095) which arose on a Writ of Error, and this question is being raised by Petition for Certiorari, in which this Court has a right to search the entire record (*First National Bank* v. *Anderson* 269 U. S. 341, 70 L Ed p 295).

The Petitioner, a layman, should not have his constitutional rights frittered away because the counsel on which he relies failed to add in the record "in violation of the 14th Amendment".

The second question that Petitioner raises as to due process of law as required by the 14th Amendment, arises from the conduct of the trial at which he was convicted. In reviewing this question, the Court should bear in mind that there had been a lockout of employees by the Jefferson Standard Broadcasting Company, in Charlotte, North Carolina; that the Petitioner and other members of the Union, who had been discharged from their employment, had set up a picket line around the property of the Jefferson Standard Broadcasting Company; that there was considerable feeling in the City of Charlotte, North Carolina, in this matter, which had been publicized in the press, and which, generally, the people of the community were fully apprised of; that the Petitioner, Sterling L. Hicks, was charged by the conspiracy to have procured the services of one Lovell to destroy the property of the Jefferson Standard Broadcasting Company, which was situated on property owned by the Duke Power Company. Naturally, there was considerable resentment among the people of Charlotte, North Carolina, as to the dastardly crime which was charged against the petitioner.

The Petitioner, therefore, asserts that the prosecuting attorney in the trial of the case should have avoided any

questions, statements, or arguments which would inflame the jury and prejudice the Petitioner against obtaining a fair trial.

The record in this case conclusively shows that the prosecuting attorney did not adopt that policy. During the trial the prosecuting attorney asked questions which he, as a lawyer, knew had no relation to the crime which was charged against the Petitioner, and which by no stretch of the imagination were proper questions or evidence, even if the prosecuting attorney had evidence to support such improper questions. The conduct of the prosecuting attorney was reprehensible and not only was his conduct objected to, but it was condoned by the Court in practically every instance. Let us examine some of the things that happened at the trial, all of which was duly excepted to by counsel for the Petitioner.

The principal witness against the Petitioner was one Lovell who, the State contended, the Petitioner had conspired with to dynamite the property in question. It is claimed that the Petitioner went to Columbia, South Carolina, and made a deal with Lovell to destroy the property of the broadcasting company. The evidence conclusively shows that Lovell admitted that he did not know the Petitioner prior to the time he was contacted in Columbia, allegedly on January 12, 1950, and it is claimed that one week later Lovell was called by a man who gave his name as Vernon Hicks, and informed that he had some dynamite hidden for him over by a sign board at a place called Jimmy's. Lovell had previously testified that he could not swear that it was Hicks' voice he heard over the telephone (R. 13), but he was permitted, over objection of Petitioner's counsel, to state as his opinion as to whose voice he heard over the telephone, and then stated the opinion that it was the voice of Mr. Hicks. The Petitioner has consistently denied that he ever saw Lovell prior to the preliminary hearing

in his case, and made no deal with him whatsoever. Lovell testified that he found the dynamite at the place where he says the person who called him on the telephone told him that it would be found (R. 15), but there was not a scintilla of evidence that Petitioner had ever seen the dynamite, that he knew anything about it, or that he had placed it where Lovell had found it.

The prosecuting attorney brought in the dynamite to which were attached no dynamite caps, but exhibited dynamite caps which were never identified by anybody. [R. 21-22]

There was no testimony in the record in any way connecting the dynamite caps which were exhibited to the witness Lovell with the charge against the Petitioner. The obvious purpose of the offer of such dynamite caps was to prejudice the Petitioner before the jury.

The witness Squires testified as to a conversation he overheard between the Petitioner in the presence of a Mr. Stroup and a Mr. Helker. This conversation took place in July, 1949, months before the alleged conspiracy was entered into on January 12, 1950, and the Petitioner is alleged to have then said "We will bankrupt them or blow the hell out of them" [R. 29]. No connection was shown between this conversation and the charge which was filed against the Petitioner, and was denied by the Petitioner and by all other witnesses.

The Prosecuting Attorney in his cross examination of the Petitioner (R. 40-41), questioned the Petitioner about having worked in a radio station in Birmingham, Alabama, before he came to Charlotte. He testified that he knew a Mr. William Bochman, former manager of the radio station at Columbia, South Carolina. The following question was asked:

> "Q I'll ask you if, in the course of your negotiations, if you didn't tell Mr. Bochman that if he felt

as he told you he felt about settling with your men, that you would not be responsible for what happened, and if, that very night, the Station wasn't knocked off the air," by sabotage?"
Objection by defendant—overruled.
EXCEPTION NO. 39 (R. 40)

The answer was made as follows:

"I did not tell Mr. Bochman anything of the kind. And furthermore, I was not handling the negotiations with Mr. Bochman at that time. I was in conference with Mr. Morris, who was the International representative handling the negotiations. I did not say anything to him."

And Petitioner was asked a question as follows:

"Q I ask you if you don't know, that the very day that you talked to Mr. Bochman, that that Radio Station was "knocked off the air" that night, by cutting the wire—or other damage to it?" [R. 41]

The answer was made as follows:

"I do not."

The record shows the following:

"I did not have any contact with Radio Station WABB in Mobile, Alabama. I do not know that Radio Station WABB was knocked off the air. I know a man by the name of Harry Clippard in Columbia. I did not go to Columbia, South Carolina, on January 12, 1950 and see this man Harry Clippard. Clippard is no longer connected with the Radio Station. He runs a Radio Repair Shop near the heart of the City of Columbia. I did not go to Clippard and have him point out to me some man that I could get to do this damage to WBT. I haven't seen Clippard since May 1948. I know a man by the name of Paul Cramm, now Chief Engineer for Radio Station WAGA in Atlanta, Ga." [R. 41]
"Q Why, I'll ask you if you don't know that you and Paul Cramm were in Mobile, Alabama, at Radio Station WABB when they were having labor diffi-

culties, and if you did not participate in putting sulphuric acid in the conduits at that Station and "throw it off the air"?"

Objection by defendant—overruled. [R. 41]

"A I did not. I was not in Mobile with Mr. Cramm. I know him. I would say he is a friend of mine."

"Q What other places have you been with Cramm?"

Objection of defendant—overruled.

"A I've been nowhere with Mr. Cramm. Mr. Cramm originally came from Birmingham. He was working with WSGM. He was a member of the same Local Union that I was. I haven't seen Cramm since I left Birmingham.'

"Q Well, now I will ask you if you don't know that at the time that you were employed at WBT that you and your friend Richardson, and others didn't wire up the office of the General Manager of WBT—Mr. Crutchfield in order that you could stay in another part of the Station or Studio and hear everything that went on in the office?"

Objection by defendant—overruled. [R. 42]

"A I would like to say—I'll answer the question and then say something: No, I did not, because I was working nine miles from the Studio. I worked at the transmitter. I came into the Studio and met there with Mr. Crutchfield and the others. I was not getting any information from Richardson."

"Q You mean to say that your man Richardson did not tell you what he was hearing from that office?"

Objection by defendant—overruled.

"A No. I didn't terminate my employment with WBT. I didn't quit working there. The last time I worked there was September 3, 1949. I can identify the photostatic copy of the letter that you hand me."

"Q Did you sign that letter and is that your signature?"

Objection by defendant—overruled. [R. 42]

"A It is."

"Q When was that letter written and by whom was it written?"

Objection by defendant—overruled.

"A It was written August 6, 1949."

"Q Were you employed by W B T at that time?" Objection by defendant—overruled. [R. 43]
"A I was."
"Q Now, I'll ask you if you didn't write to the Federal Communications Commission under date of August 6, 1949, the following letter: 'Federal Communications Commission, New Postoffice Building, Washington 25, D. C. Gentlemen: The citizens of Charlotte have been looking with anticipation for several months to the coming of television in this area. However, it is here, BUT IN NAME ONLY. In talking to various dealers of the television receivers, we find that they, as well as the general public, are much disappointed in the type and quality of programs being broadcast by the local television outlet; and too, the dealers have stocked their showrooms with television receivers, but are unable to move them, due to the fact that the general public is complaining about the program material now being presented. We feel that the local outlet is not utilizing the full facilities as granted in the license. We therefore respectfully request, unless they take advantage of the situation, that the television channel be granted to someone who will. Sincerely yours, S. L. Hicks, Business Manager, Local Union No. 1229, International Brotherhood of Electrical Workers. Carbon copies to Southern Radio Corporation, R. C. A. Service Company, Chapman and Wilhelm Company, and Southern Hardware Company.' Now, did you write and sign that letter?" Objection by defendant—overruled. [R. 43]
"A I did."
"Q I'll ask you if you did not also send duplicate copies of that letter to Southern Radio Corporation, R. C. A. Service Company, Chapman & Wilhelm Company, and Southern Hardware Company, and other dealers in the television receivers and broadcasting equipment, and advertisers on Radio Station WBT?" Objection by defendant—overruled. [R. 44]
"A I only sent it to four dealers in television receivers."
"Q Weren't they all advertisers on WBT also?" Objection by defendant—overruled. [R. 44]
"A I don't think so."

"Q Do you mean to say you don't think the Southern Radio Corporation was advertising its RCA equipment on that Station?"
Objection by defendant—overruled.
"A Not at that time." [R. 44]
"Q I will ask you if you don't know that they had a regular program on that Station around 6 or 6:30 in the evening, called "Twilight Time" or something like that, every day?"
Objection by defendant—overruled. [R. 44]
"A I can't say."
"Q Now, at the very time you wrote this letter and mailed it to these business firms in the City of Charlotte, you were drawing your pay check every week from the Radio Company that you were trying to get the Government to take the franchise from, weren't you?"
Objection by defendant—overruled. [R. 44-45]
"A State that Question again."
Thereupon the Court Reporter reads the question.
"A Not while I wrote the letter, I wasn't." [R. 45]
"Q You mean to tell this jury that you were not working for Radio Station WBT on August 6, 1949 when you wrote that letter?"
Objection by defendant—overruled. [R. 45]
"A Iwas not on their payroll at the time I wrote the letter; I was on my own time."
"Q But who was paying your salary?" [R. 45]
Objection by defendant—overruled.
"A They were paying me while I worked, but I wrote that letter on my own time."
"Q When did you work?"
Objection by defendant—overruled.
"A I worked regular schedules. [R. 45]
I worked eight hours a day for five days a week and was working for WTB. WTB was paying me for the hours that I put in. I believe it was $117.00 a week at that time."
"Q And you now say, then, that the only feeling of duty or loyalty that you owed to WBT was during the forty hours a week that they paid you for?"
Objection by defendant—overruled.
"A I do." [R. 45]

The Court will note that each and every question, improper in form and substance, that was asked the Petitioner by the Prosecuting Attorney, related to matters in no way connected with the charge for which the Petitioner was then being tried. The question that was asked the Petitioner by the Prosecuting Attorney if he had a radio station knocked off the air, did not relate to the radio station of the Jefferson Standard Broadcasting Company, nor did the indictment relate in any way to Station WABB, in Mobile, Alabama, in which the Prosecuting Attorney by inference placed before the jury the incriminating statement that the Petitioner participated in putting sulphuric acid in the conduits at that station and threw it off the air. Furthermore, all these improper questions were asked by the Prosecuting Attorney and objected to by Petitioner's counsel but in every instance the Trial Court overruled the objections and permitted the Petitioner to answer the questions. The Petitioner was even asked about a letter he wrote to the Federal Communications Commission on August 6, 1949. This letter was written by the Petitioner as Business Manager of Local Union 1229 of the International Brotherhood of Electrical Workers, shown on page 43 of the Record, and an attempt was made to show that this letter was sent to various advertisers on WBT, and that Petitioner was at the same time working for Station WBT and receiving $117.00 a week, and the Prosecuting Attorney, over objection of counsel for the Petitioner, further brought out prejudice against the Petitioner by questioning his loyalty to the company for which he was working (R. 45).

Counsel for the Petitioner asserts that he knows no rule of law by which such evidence would be admissible, and if a court could be found other than Courts in North Carolina which have approved the reprehensible conduct of the Prosecuting Attorney, this Court certainly would not follow any such precedents.

It is submitted that it was highly improper and reprehensible for counsel acting in bad faith to make statements and ask questions merely to prejudice his opponent's case for the jury.

64 C J par. 258, p 244, *Starr* v. *Southern Cotton Oil Company*, 81 S E 766, 165 N. C. 587.

Massey v. *Alstone* 91 S E 964, 173 N. C. 215.

While it is realized questions on the admissibility of evidence are matters to be decided by the State Courts, as this Court held in *Moore* v. *Dempsey*, 261 U. S. 86, 67 L Ed 543, the prohibition against a review for failure to accord due process is a matter for this Court under the 14th Amendment.

This Petitioner is about to be deprived of his liberty without due process of law by a proceeding which was a trial only in form and not in substance.

Moore v. *Dempsey*, 261 U. S. 86, 67 L Ed 543, 43 S Ct 265.

Hill v. *Texas*, 316 U. S. 400, 86 L Ed 1559 62 S Ct 1159.

Chambers v. *Florida*, 309 U. S. 227, 84 L Ed 716, 60 S Ct 472.

People v. *Becker*, 210 NY 274, 104 N E 396.

Hickory v. *United States*, 160 U. S. 408, 40 L Ed. 474, 16 S Ct 327.

Minner v. *United States* (CCA 10th) 57 Fed. 2d 506.

Weare v. *United States* (CCA 8th 1 F (2d) 617.

Mooney v. *Holohan*, 294 US 103, 79 L Ed 791, 55 S Ct 340.

People v. *Walsh*, 262 NY 141, 186 NE 422.

In the case of *Buchwalter* v. *State of N. Y.*, 319 U. S. 427, 87 L Ed. 1492, this Court said that the due process clause of the 14th Amendment requires action by a State

through any of its agencies to be consistent with the fundamental principles of liberty and justice. Those principles are applicable in all the States and do not depend upon or vary with local legislation.

Castillo v. *McConnico,* 168 U. S. 674, 682, 683, 42 L. ed, 622, 624, 625, 18 Sup. Ct. Rep. 229.

West v. *Louisiana,* 194 U. S. 258, 261-263, 48 L. Ed. 965, 968, 969, 24 Sup. Ct. Rep. 650.

Patterson v. *Colorado,* 205 U. S. 454, 459, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689.

Pullman Company v. *Knott,* 235 U. S. 23, 25, 59 L. ed. 105, 110, 35 Sup. Ct. Rep. 2.

Enterprise Irrigation Dist. v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 166, 61 L. ed. 644, 649, 37 Sup. Ct. Rep. 318.

It can hardly be assumed that the asking of questions which intimated that the Petitioner was guilty of other crimes which had no connection with the charge against him, was consistent with the fundamental principles of liberty and justice. Where this requirement has been disregarded in a criminal trial in a State Court, this Court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantees.

Buchwalter v. *State of New York, supra.*

The Petitioner submits that the question of whether the Petitioner in the trial of the charge against him received due process of law, is a matter arising under the 14th Amendment, and that this constitutional right was raised by his counsel by objecting to the conduct of the prosecuting attorney, the introduction of evidence, and the questions asked the witnesses, which prejudiced the rights of the Petitioner before the jury and placed him in a most unfavorable light.

The Petitioner asserts that this Court in the interest of right and justice, and particularly where the Peti-

tioner's rights have been so flagrantly violated, should take jurisdiction to review the case on the Petitioner's Petition for Certiorari. It should not be necessary for this Petitioner to go again to the Supreme Court of North Carolina and raise his constitutional objections to his trial and conviction by a writ of habeas corpus. This would only delay the administration of justice, and the Petitioner, an innocent man who has been successfully "framed" by the perjury of the State's witnesses, should have immediate relief from the void judgment of conviction against him.

For the reasons herein stated, this Court should take jurisdiction of this case, first, upon the ground that due process has not been accorded to the Petitioner by his conviction of a crime of which he had already been acquitted, and second, by the trial which he received and the conduct of the prosecuting attorney who obtained a conviction only by prejudicing the Petitioner before the jury. This alleged trial took place in the United States of America, and not in the Soviet Union.

The Supreme Court of North Carolina has in all things affirmed the conviction of the Petitioner and at this point of time no further relief may be expected from the Courts of North Carolina.

QUESTIONS PRESENTED

This case involves the question of whether the Courts of North Carolina have complied with the Fourteenth Amendment to the Constitution of the United States by affording to the Petitioner that due process of law as required by this Amendment to the Constitution of the United States.

The Petitioner contends that he is about to be deprived of his liberty without due process because of the failure of the Courts of North Carolina to properly apply the Constitution of that State which provides that no person may be tried for the same offense after an acquittal, and that this violates not only the Constitution of North Carolina but also the Fifth Amendment to the Constitution of the United States. That the Petitioner has twice been placed in jeopardy. The Petitioner further contends that the trial he had at which he was convicted he was not accorded due process of law. That he did not receive a fair trial as he was entitled to receive under the Fourteenth Amendment to Constitution of the United States.

STATEMENT OF FACTS

At the January 8, 1951, Regular Criminal Term of Mecklenburg Superior Court in the State of North Carolina, a bill of Indictment was returned by the Grand Jury against the Petitioner which charged that the Petitioner conspired with one Chesley Morgan Lovell to "maliciously commit damage and injury to and upon the real property of the Duke Power Company. The Indictment was in two counts as follows: (R. 2)

(First Count)

> "The Jurors for the State upon their oath present, that: Sterling L. Hicks late of the County of Mecklenburg on the 12th day of January, 1950, and prior thereto and thereafter with force and arms, at and in the County aforesaid did wilfully and unlawfully combine, conspire, confederate and plan with one Chesley Morgan Lovell, and with other persons to the State unknown, to maliciously commit damage and injury to and upon the real property of Duke Power Company, against the form of the statute in such cases made and provided and against the peace and dignity of the State:

(Second Count)

And the Jurors for the State upon their oath FURTHER PRESENT, that Sterling L. Hicks late of the County of Mecklenburg, on the 12th day of January, 1950 and prior thereto and thereafter, with force and arms, at and in the County aforesaid did wilfully and unlawfully combine, conspire, confederate and plan with one Chesley Morgan Lovell, and with other persons to the State unknown, to wantonly and wilfully and maliciously injure the personal property of Duke Power Company, to wit: electrical transformers and other equipment of said Duke Power Company, said property being situate and located upon and near the property of the Jefferson Standard Broadcasting Company against the form of the statute and in such case made and provided and against the peace and dignity of the State."

The case was called for trial during the week of January 22, 1951, and upon the call for trial the Petitioner filed a plea to the Indictment of "Plea of former acquittal or former jeopardy. (R. 5-6-7-8-9)

This plea of former acquittal or former jeopardy was predicated upon the acquittal of the Petitioner on an Indictment charging the same offense as was charged in the Indictment for which he was being tried. The Petitioner was tried on Indictment No. 15-772 on March 20, 1950 (R. 6) and was acquitted. At the same time on March 20, 1950, the Court non-suited the State on Indictment No. 15-773. (R. 7).

The only difference between the Indictment on which the Petitioner was placed on trial on January 22, 1951, and the Indictments No. 15-772, and No. 15-773, on which the Petitioner had been acquitted, and the State non-suited are the allegations as to the ownership of the property. The owners in the first Indictments were referred to as the Jefferson Standard Broadcasting Company, and the last Indictments as the Duke Power Company.

Counsel for the Petitioner requested that the issue of whether the Petitioner had been acquitted of the charge for which he was being tried be submitted to the jury (R. 8-9). Attention was directed to the Judge of the Superior Court that the same evidence and the same witnesses would be used to prove the charge of the Indictments as had been produced at the trial at which the Petitioner had been acquitted. The Court refused to submit the issue to the jury, and then overruled the plea of former jeopardy. (R. 9).

The case then proceeded to trial and resulted in a verdict of guilty on both counts of the Indictment. From this verdict and judgment of the Superior Court, an appeal was taken, and the judgment has been in all things affirmed by the Supreme Court of North Carolina. (R. 125-133).

REASONS FOR GRANTING THE WRIT

The Petitioner asserts that a writ of certiorari should be granted under subdivision (a) of Paragraph 5, of Rule 38 of this Court in that the Supreme Court of North Carolina has decided a federal question of substance namely the question of double jeopardy and due process of law in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States. The State of North Carolina by the decisions of its courts has denied to the Petitioner his liberty without due process of law.

The particular grounds for the assertion of this question is briefed in this petition under the heading of "Jurisdiction."

ARGUMENT AND BRIEF

This petition for certiorari raises a constitutional question arising under the Fourteenth Amendment to the Constitution of the United States. The attention of the Court is directed to the authorities cited and compiled in the section of this petition relating to the jurisdictional question, and it is not deemed necessary to again repeat the authorities cited there. The authorities herein cited are in addition to the authorities cited under the jurisdictional question.

The right not to be put in jeopardy a second time for the same cause is as important as the right of trial by jury. Accordingly there will be found in the Constitution of the United States, and in the Constitution of the various States a provision that no person shall for the same offense be twice put in jeopardy. This is only a recognition of the common law rule. A plea of double jeopardy is therefor good either under the Constitution or the common law. The legislature cannot deprive citizens of this constitutional right.

American Juris. Vol. 15, Par. 360, pp. 40-41

This protection is afforded not only against the peril of second punishment but against being again tried for the same offense.

Stroud v. *United States* 251 U. S. 15, 64 L. Ed. 103 American Juris. Vol. 15, pp. 40, and cases cited under foot note 18.

If the Constitutional and common law right of not being placed in double jeopardy cannot be destroyed by the legislative bodies of the various States by the same analogy it would seem that the such rights cannot be destroyed by judicial decisions.

The Supreme Court of North Carolina has ruled that a citizen cannot be placed twice in jeopardy.

State v. *Bell,* 205 N. C. 225, 171 S. E. 50.

Yet in this case the same Supreme Court rules that the Petitioner may again be placed in jeopardy. The Petitioner was already acquitted of the offense of which he now stands convicted.

The Petitioner was indicted on a conspiracy charge. The law is well settled that where the acts charged are all included within one conspiracy there may be only one lawful prosecution. There can be only one prosecution for a conspiracy which violates a number of statutes.

American Juris Vol. 15, par. 383, p. 59, and cases cited.

In many jurisdictions if a minor offense is embraced within a higher crime as a constituent element or component part and on the trial of the higher offense there could be conviction of the minor offense, or an acquittal will bar a prosecution for the higher crime.

This appears to be the law of North Carolina.

State v. *Bell, supra.*

In the case of *Short* v. *United States* 91 Fed. 2d 614, 112 ALR 562, cited in the authorities under the jurisdictional question the law on double jeopardy in conspiracy cases has been carefully collected and cited by the Distinguished Jurist Parker of the United States Court of Appeals for the Fourth Circuit. If the authorities cited in the Short case are followed it is crystal clear that the plea of double jeopardy filed on behalf of this Petitioner should have been sustained by the Courts of North Carolina.

The Petitioner has already pointed out that the only difference between the indictment under which he was con-

victed, and the one under which he was acquitted relate to the ownership of the property. The indictment charged that the Petitioner conspired to commit damage to property, this property was properly identified in the Indictment when the Petitioner was acquitted.

The ownership of the property is not important. It was not even necessary to state the owners of the property but only to describe the property.

People v. *Robertson* 284 Ill. 620, 120 N. E. 539, 31 C. J. 732.

It is an established maxim of the common law in the administration of criminal justice, constantly recognized by elementary writers and courts of judicature from a very early period down to the present time that a man shall not be brought into danger of his life or limb for one and the same offense more than once.

8 R. C. L. 134, 135.

State v. *McJimsey* 80 N. C. 377, 30 Am. Rep. 90.

This rule against double jeopardy long established at common law prohibits a second punishment for the same offense, but it goes much further and holds a second trial for the same offense whether the accused had suffered punishment or not, and whether in the former trial he has been convicted or acquitted.

Kepner v. *United States* 195 U. S. 100, 49 L. Ed. 114. See annotations in 45 LRA. (NS) 60.

The second point raised by the petitioner relates to the conduct of the trial at which he was convicted by the jury. The failure to accord the Petitioner a fair trial raises a question under the Fourteenth Amendment to the Constitution. Petitioner invites the Court's attention to the many authorities cited under the jurisdictional question in this petition, and it is not deemed necessary to recite the many violations of proper conduct by the prosecuting

attorney in attempting, and actually bringing before the jury matters which were in no way connected with the offense for which the Petitioner was being tried.

The trial was a travesty on justice.

The Petitioner respectfully submits that since his constitutional rights have been violated this Court should assume jurisdiction in this case to prevent a serious miscarriage of justice. The question of whether the Petitioner's constitutional rights have been violated arise from the record itself. Counsel for the Petitioner in the Courts below objected to the violation of Petitioner's constitutional rights raising the points thereby but did not use the technical words of under the Fourteenth Amendment. It is respectfully submitted that this Court should look to the substance and not to the form where Constitutional questions arise, and as in this case where the Constitutional questions have in fact been raised but not citing the Fourteenth Amendment in name nevertheless by reason of fairness and justice and overlooking technicalities jurisdiction should be taken. If the Petitioner is to be denied his Constitutional rights simply because his counsel did not add the words "in violation of the Fourteenth Amendment" after proper objection which apprised the lower courts of the question then jurisdiction would be limited to form and not substance. The petition for a writ of certiorari should be granted.

CONCLUSION

WHEREFORE, the Petitioner prays that a writ of certiorari may issue under the Seal of this Honorable Court in this Cause directed to the Supreme Court of North Carolina, and that upon a review the judgment of the Supreme Court of North Carolina be vacated, reversed, and set aside, and this cause remanded to that Court with instructions to proceed further in accordance with the views of this Court.

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